

BILL ANALYSIS

S.B. 33
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Human Services
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Recent legislation provided for video surveillance at state supported living centers but limited the use of surveillance to public areas of a center to ensure that residents still retained some sense of privacy. Such surveillance is not allowed in private areas, such as a resident's room, however. Many guardians and parents of residents who do not have the capacity to communicate for themselves have expressed that they want the right to install surveillance equipment in their loved ones' rooms, with consent of all other persons occupying the room, in order to ensure that their loved ones are not being abused or neglected. Residents of nursing homes already have that right and are required to turn over any evidence of abuse or neglect to the investigative body of that facility. S.B. 33 seeks to ensure these same protections for residents of a state supported living center by allowing for the audio or video monitoring of such a resident's room under certain conditions.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 2 of this bill.

ANALYSIS

S.B. 33 amends the Health and Safety Code to require a state supported living center to permit a resident or the resident's guardian or legal representative to monitor the resident's room through the use of electronic monitoring devices. The bill defines "electronic monitoring device" to include video surveillance cameras installed in a resident's room and audio devices installed in a resident's room designed to acquire communications or other sounds occurring in the room and specifies that the term does not include an electronic, mechanical, or other device that is specifically used for the nonconsensual interception of wire or electronic communications. The bill requires the center to require a resident who conducts authorized electronic monitoring or the resident's guardian or legal representative to post and maintain a conspicuous notice at the entrance to the resident's room stating that the room is being monitored by an electronic monitoring device. The bill establishes that such authorized electronic monitoring is not compulsory and may be conducted only at the request of the resident or the resident's guardian or legal representative. The bill prohibits a center from refusing to admit an individual to residency in the center and from removing a resident from the center because of a request to conduct authorized electronic monitoring and prohibits a center from removing a resident from the center because covert electronic monitoring is being conducted by or on behalf of a resident. The bill establishes that the placement and use of an electronic monitoring device in a resident's room are considered to be covert if the placement and use of the device are not open and obvious and the center and the Department of Aging and Disability Services (DADS) are not informed about the device by the resident, by a person who placed the device in the room, or by a person who is using the device.

S.B. 33 requires a center to make reasonable physical accommodation for authorized electronic monitoring, including providing both a reasonably secure place to mount the video surveillance camera or other electronic monitoring device and access to power sources for such device. The

bill requires the resident or the resident's guardian or legal representative to pay for all costs associated with conducting electronic monitoring, other than the costs of electricity, and specifies that the resident or the resident's guardian or legal representative is responsible for all costs associated with installing and maintaining the equipment. The bill authorizes a center to require an electronic monitoring device to be installed in a manner that is safe for residents, employees, or visitors who may be moving about the room and authorizes the executive commissioner of the Health and Human Services Commission (HHSC) by rule to adopt guidelines regarding the safe placement of an electronic monitoring device. The bill authorizes the center, if authorized electronic monitoring is conducted, to require the resident or the resident's guardian or legal representative to conduct the electronic monitoring in plain view and establishes that a center is authorized but not required to place a resident in a different room to accommodate a request to conduct authorized electronic monitoring.

S.B. 33 establishes a defense to prosecution for an offense of unlawful interception, use, or disclosure of wire, oral, or electronic communications, or for an offense under any state law that makes it an offense to intercept a communication or disclose or use an intercepted communication, that the communication was intercepted by an electronic monitoring device placed in a resident's room. The bill establishes that its provisions do not affect whether a person may be held civilly liable under other law in connection with placing an electronic monitoring device in a resident's room or in connection with using or disclosing a tape or recording made by the device except as specifically provided by the bill's provisions or to the extent that liability is affected by a consent or waiver signed under the bill's provisions or the fact that authorized electronic monitoring is required to be conducted with notice to persons who enter a resident's room. The bill establishes that a communication or other sound acquired by an audio electronic monitoring device installed under the bill's provisions concerning authorized electronic monitoring is not considered to be an oral communication for purposes of provisions relating to detection, interception, and use of wire, oral, or electronic communications or a communication for purposes of provisions relating to the interception of communications. The bill establishes that DADS and the center may not be held to be civilly liable in connection with the covert placement or use of an electronic monitoring device in a resident's room.

S.B. 33 requires the executive commissioner by rule to prescribe a form required to be completed and signed on a resident's admission to a center by or on behalf of the resident that states the following:

- that a person who places an electronic monitoring device in a resident's room or who uses or discloses a tape or other recording made by the device may be civilly liable for any unlawful violation of the privacy rights of another;
- that a person who covertly places an electronic monitoring device in a resident's room or who consents to or acquiesces in the covert placement of the device in a resident's room has waived any privacy right the person may have had in connection with images or sounds that may be acquired by the device;
- that a resident or the resident's guardian or legal representative is entitled to conduct authorized electronic monitoring under the bill's provisions and that the person should contact DADS if the center refuses to permit the electronic monitoring or fails to make reasonable physical accommodations for the authorized electronic monitoring;
- the basic procedures that must be followed to request authorized electronic monitoring;
- the manner in which the bill's provisions affect the legal requirement to report abuse, neglect, or exploitation when electronic monitoring is being conducted; and
- any other information regarding covert or authorized electronic monitoring that the executive commissioner considers advisable to include on the form.

S.B. 33 authorizes only the resident to request authorized electronic monitoring under the bill's provisions if the resident has capacity to request electronic monitoring and has not been judicially declared to lack the required capacity. The bill authorizes only the guardian of the

resident to request electronic monitoring if the resident has been judicially declared to lack the capacity required for taking an action such as requesting electronic monitoring and authorizes only the legal representative of the resident to request electronic monitoring if the resident does not have the capacity to request electronic monitoring but has not been judicially declared to lack the required capacity. The bill requires the executive commissioner by rule to prescribe guidelines that will assist centers, family members of residents, advocates for residents, and other interested persons to determine when a resident lacks the required capacity and to prescribe who may be considered to be a resident's legal representative for purposes of the bill's provisions, including persons who may be considered the legal representative under the terms of an instrument executed by the resident when the resident had capacity and persons who may become the legal representative for the limited purpose of the bill's provisions under a procedure prescribed by the executive commissioner.

S.B. 33 requires a resident or the guardian or legal representative of a resident who wishes to conduct authorized electronic monitoring to make the request to the center on a form prescribed by the executive commissioner. The bill requires the form to require the resident or the resident's guardian or legal representative to release the center from any civil liability for a violation of the resident's privacy rights in connection with the use of the electronic monitoring device; to choose, when the electronic monitoring device is a video surveillance camera, whether the camera will always be unobstructed or whether the camera should be obstructed in specified circumstances to protect the dignity of the resident; and to obtain the consent of other residents in the room, using a form prescribed for this purpose by the executive commissioner, if the resident resides in a multiperson room. The bill authorizes such consent to be given only by the other resident or residents in the room; by the guardian of the other resident or residents in the room if such persons have been judicially declared to lack the required capacity; or by the legal representative who is authorized to request electronic monitoring on behalf of the other resident or residents in the room if such persons do not have capacity to sign the form but have not been judicially declared to lack the required capacity. The bill requires the form prescribed for obtaining the consent of other residents in the room to condition that consent on the other resident also releasing the center from any civil liability for a violation of the person's privacy rights in connection with the use of the electronic monitoring device. The bill authorizes another resident in the room, when the proposed electronic monitoring device is a video surveillance camera, to condition consent on the camera being pointed away from the consenting resident and to condition consent on the use of an audio electronic monitoring device being limited or prohibited.

S.B. 33 requires authorized electronic monitoring to cease until a new resident has consented in accordance with the bill's provisions if authorized electronic monitoring is being conducted in a resident's room and another resident is moved into the room who has not yet consented to the electronic monitoring. The bill authorizes the executive commissioner to include other information that the executive commissioner considers to be appropriate on the request and consent forms that the executive commissioner is required to prescribe and authorizes the executive commissioner by rule to prescribe the place or places where such a form is required to be maintained and the period for which it must be maintained. The bill prohibits the start of authorized electronic monitoring until all required request and consent forms have been completed and returned to the center and requires such monitoring to be conducted in accordance with any limitation placed on the monitoring as a condition of the consent given by or on behalf of another resident in the room.

S.B. 33 requires a person who is conducting authorized electronic monitoring under the bill's provisions and who has cause to believe, based on the viewing of or listening to a tape or recording, that a resident is in a state of abuse, neglect, or exploitation or has been abused, neglected, or exploited to report that information to the Department of Family and Protective Services (DFPS) as required by law under provisions relating to investigations and protective services for elderly and disabled persons and to provide the original tape or recording to DFPS. The bill requires DFPS, if it has cause to believe that a resident has been abused, neglected, or exploited by another person in a manner that constitutes a criminal offense, to immediately

notify law enforcement and HHSC's office of inspector general as provided by statutory provisions relating to reports of criminal conduct to a law enforcement agency and to provide a copy of the tape or recording to law enforcement or the inspector general on request.

S.B. 33 authorizes a tape or recording created through the use of covert or authorized electronic monitoring as described by the bill's provisions to be admitted into evidence in a civil or criminal court action or administrative proceeding subject to applicable rules of evidence and procedure and the requirements of the bill's provisions. The bill prohibits a court or administrative agency from admitting into evidence a tape or recording created through the use of covert or authorized electronic monitoring or from taking or authorizing action based on the tape or recording unless, if the tape or recording is a video tape or recording, the tape or recording shows the time and date that the events acquired on the tape or recording occurred; the contents of the tape or recording have not been edited or artificially enhanced; and, if the contents of the tape or recording have been transferred from the original format to another technological format, the transfer was done by a qualified professional and the contents of the tape or recording were not altered. The bill requires a person who sends more than one tape or recording to DADS to identify for DADS each tape or recording on which the person believes that an incident of abuse or exploitation or evidence of neglect may be found and authorizes the executive commissioner by rule to encourage persons who send a tape or recording to DADS to identify the place on the tape or recording where an incident of abuse or evidence of neglect may be found.

S.B. 33 requires each center to post a notice at the entrance to the center stating that the rooms of some residents may be being monitored electronically by or on behalf of the residents and that the monitoring is not necessarily open and obvious and requires the executive commissioner by rule to prescribe the format and the precise content of the notice. The bill authorizes DADS to impose appropriate sanctions on a director of a center who knowingly refuses to permit a resident or the resident's guardian or legal representative to conduct authorized electronic monitoring, refuses to admit an individual to residency or allows the removal of a resident from the center because of a request to conduct authorized electronic monitoring, allows the removal of a resident from the center because covert electronic monitoring is being conducted by or on behalf of the resident, or violates another of the bill's provisions.

S.B. 33 makes it a Class B misdemeanor offense for a person to intentionally hamper, obstruct, tamper with, or destroy an electronic monitoring device installed in a resident's room in accordance with the bill's provisions or a tape or recording made by the device. The bill establishes a defense to prosecution for such an offense if the person took the action with the effective consent of the resident on whose behalf the electronic monitoring device was installed or the resident's guardian or legal representative.

S.B. 33 requires the executive commissioner, not later than September 1, 2013, to develop the forms required by the bill and the required guidelines to assist centers, family members of residents, advocates for residents, and other interested persons to determine when a resident lacks the required capacity to request electronic monitoring.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2013.